CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

No. ~~632~~ 472

THE UNITED STATES OF AMERICA, PETITIONER

vs.

BOSTON BUICK COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 5, 1930
CERTIORARI GRANTED MARCH 17, 1930

(34763)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 632

THE UNITED STATES OF AMERICA, PETITIONER

vs.

BOSTON BUICK COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., First Circuit	1	1
Caption [omitted in printing]	1	1
Record from D. C. U. S., District of Massachusetts	1	1
Petition	1	1
Order overruling demurrer	5	3
Answer	5	3
Agreed statement of facts	6	4
Exhibit A—Schedule of overassessments	8a	6
Exhibit B—Schedule of refunds and credits	8b	8
Minute entry of hearing	10	10
Agreement for judgment	10	11
Judgment	10	11
Defendant's substitute bill of exceptions	10	11
Opinion, Brewster, J	15	14
Defendant's petition for appeal and order allowing same	18	17
Defendant's assignment of errors	19	17
Citation and service [omitted in printing]	20	18
Clerk's certificate [omitted in printing]	21	18
Memorandum re order enlarging time	21	18
Argument and submission [omitted in printing]	23	18
Judgment	23	18
Opinion, Wilson, J	25	19
Order staying mandate	31	23
Clerk's certificate [omitted in printing]	31	23
Order allowing certiorari	32	24

1 [Caption omitted.]

In United States District Court, District of Massachusetts

No. 3104, law docket

BOSTON BUICK COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition

Filed August 8, 1927

1. The petitioner is a corporation organized and existing under the laws of the Commonwealth of Massachusetts, having its usual office and place of business at Boston in said Commonwealth and within this district. The petitioner was formerly named Buick Boston Company and by amendment to its charter in 1919 its name was changed to Boston Buick Company.

2 2. The amount claimed in this petition does not exceed ten thousand dollars.

3. The accounting period of the petitioner is and was during the years hereinafter referred to a fiscal year ending July 31. On or about January 6, 1919, in accordance with extensions of time for filing returns granted by the Commissioner of Internal Revenue, the petitioner duly made to the collector of internal revenue at said Boston a tentative return of its income for the fiscal year ended July 31, 1918, under the provisions of the revenue act of 1917, and within 3 the time allowed by said extensions, to wit, on or about June 14, 1919, made a final return of its income for said period to said collector under the provisions of the revenue act of 1917 and the revenue act of 1918.

4. Upon its said returns the petitioner was originally assessed income and profits taxes amounting to $109,005.85, and an additional assessment was later made, to wit, on or about August 18, 1921, in the sum of $1,421.19, making a total assessment for said period of $110,427.04. The amount of said assessment was paid by the petitioner to the said collector of internal revenue on the following dates:

January 6, 1919	$80,000.00
January 8, 1919	17,584.56
March 17, 1919	6,263.41
September 12, 1919	2,302.56
December 9, 1919	2,855.32
August 19, 1921	1,421.19
Total	$110,427.04

5. On or about December 17, 1923, the petitioner made application to the Commissioner of Internal Revenue for special assessment of its excess-profits tax for said period under the provisions of
3 section 210 of the revenue act of 1917, and section 328 of the revenue act of 1918. On February 19, 1924, the petitioner duly filed a claim for refund of the taxes paid for said period in the sum of $82,233.56 upon the ground that it was entitled to special assessment under the sections above referred to. On or about February 26, 1924, the petitioner was notified by the Commissioner of Internal Revenue that its application for special assessment had been allowed and that the correct tax liability of the petitioner for said period was $87,245.96, resulting in an overassessment of $23,181.08, and that the amount of said overassessment would be made the subject of a certificate of overassessment to be forwarded through the office of the collector of internal revenue at Boston, and to be applied by him in accordance with section 252 of the revenue act of 1921.

6. The petitioner is informed and believes and therefore avers that the overassessment referred to in the foregoing paragraph was listed by the Commissioner of Internal Revenue upon a schedule of overassessments under date of March 14, 1924, and on said date was forwarded by him to the collector of internal revenue at Boston for the purpose of having the same checked against the books and records in the office of said collector and to be thereafter returned to the commissioner for final allowance; that said schedule of overassessments was thereafter checked by the said collector and returned by him to the Commissioner of Internal Revenue on or about July 11, 1924, and that said overassessment was thereafter finally allowed.

7. The petitioner on April 15, 1924, duly filed with the Commissioner of Internal Revenue a claim for credit in the sum of $15,903.99 against an installment of the tax due from the petitioner on that date for its fiscal year ended July 31, 1923, and on July 3, 1924, filed a further claim for credit in the sum of $7,277.09 against an
4 installment of the tax due from the petitioner on July 15, 1924, for its fiscal year ended July 31, 1923, both of which claims have been allowed.

8. The petitioner is ignorant as to the exact date of the allowance of said claims, but is informed and believes and therefore avers that its said claims for credit were not allowed until after July 11, 1924, and that interest upon the amount of said credits should be allowed and paid to it upon the basis and in the manner provided in said section 1019 of the revenue act of 1924.

9. No interest was allowed or paid upon the amount of said credits until February 1, 1926, upon which date the Commissioner of Internal Revenue allowed interest in the amount of $219.02, which was computed at one-half of one per cent per annum on the sum of $1,421.19, the amount of the additional assessment, from August 18, 1921, the date when the additional assessment was paid, to March 14, 1924, under the claim by the said commissioner that interest upon

said overassessment was governed by section 1324–a of the revenue act of 1921.

10. The petitioner says that it has not been allowed and paid the amount of interest to which it is entitled upon said credits in that it is entitled to interest upon the amount of said credits at the rate of 6 per cent per annum from the date the tax was paid to the due dates of the amounts against which its said credits were taken as provided in section 1019 of the revenue act of 1924, and that the said commissioner has erred in the allowance of interest under the provisions of section 1324–a of the revenue act of 1921.

11. Wherefore your petitioner prays that this honorable court adjudge that the defendant owes it interest upon the sums of $15,903.99 and $7,277.09 from the dates said amounts were paid to April 15, 1924, and July 15, 1924, respectively, at the rate of six per cent per annum, less the amount of $219.02 heretofore allowed and paid.

[SEAL.]

BOSTON BUICK COMPANY,
By DANIEL E. AMES,
Treasurer.

5 [*Duly sworn to by D. E. Ames; jurat omitted in printing.*]

In United States District Court

Order overruling demurrer

This cause was thence continued to the September term, A. D. 1927, when, to wit, September 21, 1927, a demurrer was filed by consent.

Said cause was thence continued to the December term, A. D. 1927, when, to wit, January 17, 1928, said cause was set down for hearing on demurrer, the Honorable Elisha H. Brewster, district judge, sitting, and it was ordered by the court that said demurrer be overruled.

In United States District Court

Answer

Filed January 19, 1928

Now comes the defendant in the above-entitled action and for its answer denies each and every item, allegation, count, and particular in said petition contained.

By its attorneys,

FREDERICK H. TARR,
United States Attorney,
By J. M. LEINENKUGEL,
Special Assistant to the U. S. Attorney.

6 In United States District Court

Agreed statement of facts

Filed March 14, 1928

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the following facts may be taken as true, provided, however, that this stipulation shall not affect the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The petitioner is a corporation organized and existing under the laws of the Commonwealth of Massachusetts, having its usual office and place of business at Boston, in said Commonwealth and within this district. The petitioner was formerly named Buick Boston Company, but by amendment to its charter in 1919 its name was changed to Boston Buick Company.

2. The amount claimed in this petition does not exceed ten thousand dollars.

3. The accounting period of the petitioner is and was during the years hereinafter referred to a fiscal year ending July 31. On or about January 6, 1919, in accordance with extensions of time for filing returns granted by the Commissioner of Internal Revenue, the petitioner duly made to the collector of internal revenue at said Boston a tentative return of its income for the fiscal year ended July 31, 1918, under the provisions of the revenue act of 1917 and within the time allowed by said extensions, to wit, on or about June 14, 1919, made a final return of its income for said period to said collector under the provisions of the revenue act of 1917 and the revenue act of 1918.

4. Upon its said returns the petitioner was originally as-
7 sessed income and profits taxes amounting to $109,005.85, and an additional assessment was later made, to wit, on or about August 18, 1921, in the sum of $1,421.19, making a total assessment for said period of $110,427.04. The amount of said assessment was paid by the petitioner to the said collector of internal revenue on the following dates:

January 6, 1919	$80,000.00
January 8, 1919	17,584.56
March 17, 1919	6,263.41
September 12, 1919	2,302.56
December 9, 1919	2,855.32
August 19, 1921	1,421.19
Total	$110,427.04

5. On or about December 17, 1923, the petitioner made application to the Commissioner of Internal Revenue for special assessment of its excess profits tax for said period under the provisions of section 210 of the revenue act of 1917 and section 328 of the revenue act of 1918. On February 19, 1924, the petitioner duly filed a claim for

refund of the taxes paid for said period in the sum of $82,233.56 upon the ground that it was entitled to special assessment under the sections above referred to. On or about February 26, 1924, the petitioner was notified by the Commissioner of Internal Revenue that its application for special assessment had been allowed and that the correct tax liability of the petition for said period was $87,245.96, resulting in an overassessment of $23,181.08, and that the amount of said overassessment would be made the subject of a certificate of overassessment to be forwarded through the office of the collector of internal revenue at Boston, and to be applied by him in accordance with section 252 of the revenue act of 1921.

6. The overassessment referred to in the foregoing paragraph was listed by the Commissioner of Internal Revenue upon a
8 schedule of overassessments under date of March 14, 1924, and forwarded by him to the collector of internal revenue at Boston, a copy of which schedule, including the certificate of deputy commissioner, authorization of commissioner, and certificate of collector, appearing thereon, is annexed hereto and made a part hereof, being marked "A." The collector, under date of July 11, 1924, acted upon said schedule, made the entries shown on said schedule in the columns headed "Entries to be made by the collector," certified thereto as set forth in "Certificate of collector," and returned the same to the commissioner, together with a schedule of refunds and credits, a copy of which, including the certificate of collector, certificate of deputy commissioner, and authorization of commissioner, appearing thereon, is annexed hereto and made a part hereof, being marked "B."

7. The petitioner on April 15, 1924, duly filed with the Commissioner of Internal Revenue a claim for overpayment for the fiscal year 1918 of $23,101.08 asking for a credit in the sum of $15,903.99 against an installment of income tax due from the petitioner on that date for its fiscal year ended 1923 and a refund of the sum of $7,277.09, and thereafter, on July 3, 1924, filed a further claim asking that the amount of $7,277.09 theretofore claimed as a refund be applied as a credit against an installment of income tax due from the petitioner on July 15, 1924, for its fiscal year ended 1923.

8. Said overassessment was applied by the collector as follows: On July 11, 1924, there was entered upon the books of the collector against outstanding taxes due from the petitioner on October 15, 1919, for the fiscal year ended 1919 a credit of $7,277.09, and in addition thereto a credit of $15,903.99 against an installment of income tax due from the petitioner on April 15, 1924, for the fiscal year ended 1923. Thereafter, on November 11, 1924, said credit of $7,277.09 was applied by the collector against an installment of income tax due from the petitioner on July 15, 1924, for the
9 fiscal year ended 1923, and taken away from the petitioner's account for fiscal year 1919.

TREASURY DEPARTMENT
U. S. Internal Revenue Service
Form 7805
Form approved by Comptroller General
Feb. 5, 1923

[Copy]

Ex "A"

Schedule No. IT-A-9272.
Sheet 1 of ——— sheets.

District of Massachusetts.

SCHEDULE OF OVERASSESSMENTS AND ALLOWANCE OF ABATEMENTS, CREDITS, REFUNDS, AND RELATED CLAIMS, IF ANY

INCOME TAX UNIT

Certificate of deputy commissioner

Commissioner of Internal Revenue:

The returns of the taxpayers listed herein, together with their claims (if any) and appropriate supporting evidence, have been carefully examined and the tax liability of the respective taxpayers has been determined in accordance with the available facts and the law. The overassessments or reductions in tax liability appearing in column 4 are accordingly recommended for allowance.

Date March 14, 1924.

J. G. BRIGHT, *Deputy Commissioner.*

Authorization of commissioner

To the Collector ——— District of Massachusetts:

The amounts listed in column 4 as overassessments (or reductions of tax liability) are hereby approved, and the related claims, if any, allowed in the respective amounts indicated by the "Certificates of Overassessment" or "Notices of Adjustment of Claim for Abatement" attached thereto.

You will immediately check such items against the accounts of the several taxpayers, and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated, in whole or in part, and make such abatements as may be warranted by the condition of the taxpayers' accounts for the years involved.

If any part of any such item is found to be an overpayment, you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, making the appropriate entries in your accounts. (This applies only to income, war profits, and excess profits taxes.) Such credits will be entered in column 9, and placed in column 5 of a subsidiary schedule of refunds and credits (Form 7805–A).

The balance, if any, of the overpayment will be entered in column 12, and placed in column 4 of the subsidiary schedule (Form 7805–A) referred to above, and an appropriate memorandum made upon the taxpayer's account.

You will thereupon complete and certify this schedule and the schedule upon Form 7805–A, and return the necessary copies of each to the Commissioner of Internal Revenue.

(Signed) D. H. BLAIR,
Commissioner of Internal Revenue.

Date March 14, 1924.

Certificate of collector

To the Commissioner of Internal Revenue:

The items in this schedule have been checked against the accounts of the respective taxpayers concerned and the amounts indicated have been applied as abatements and credits on their accounts.

The amounts of overpayment and the net amounts refundable have been determined to be as indicated herein.

Date July 11, 1924.

(Signed) MALCOLM E. NICHOLS,
Collector ——— District of Massachusetts.

Item No.	Certificate of overassessment or claim number	Name of taxpayer	Overassessments or reductions of tax liability (amount)	List, page and line, or account number	Taxable year	(Entries to be made by the collector) Abatement (amount)	Overpayment (account)	Credit (amount carried to Form 7805-A)	Account credited, list, page, and line	Due date of items against which credit was made	Net amount refundable carried to Form 7805-A	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
X	X X	Totals of ——— items in this schedule		X X X	X				X X X	X X		X X
...	X X	X X X	X X	...	X X	X X	X X	X X	X X	X X	X X	X X
11	651133	Buick Boston Co	23,181.08	...	July 31, 1918	...	23,181.08	7,277.09 15,903.99	Oct. 19-Oct. 4, 1106, 10-15-19. 1-15-19. Jan. 24, 400809, 3-31-24. 4-15-19. 4-15-19.	...	...	O. A.
...	X X	X X X	X X	...	X X	X X	X X	X X	X X	X X	X X	X X
X	X X	Page totals only	...	X X X	X	...	...	...	X X X	X X	...	X X

103678—30——2

82 TREASURY DEPARTMENT
U. S. Internal Revenue Service
Form 780–A
Form approved by Comptroller General
Feb. 5, 1923

[Copy]

Ex. "B"

Schedule No. IT–R–9272
Sheet 1 of ——— sheets.
Dist. of Mass.

SCHEDULE OF REFUNDS AND CREDITS—ILLEGAL OR ERRONEOUS COLLECTIONS

INCOME TAX UNIT

Certificate of Collector

To the Commissioner of Internal Revenue:

The items hereon are relisted as they appeared for refund or credit on an original schedule (bearing the same number) of overassessments and related claims, if any, heretofore approved and allowed by the Commissioner of Internal Revenue. An examination of the accounts of the several taxpayers named disclosed such items to be the portions of such previously allowed overassessments or reductions of tax liability subject to refund or credit.

Date July 11, 1924.

(Signed) MALCOLM E. NICHOLS,
Collector. ——— *District of Mass.*

Certificate of Deputy Commissioner

Commissioner of Internal Revenue:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due.

Date July 31, 1924.

———,
Deputy Commissioner.

Authorization of Commissioner

To the Disbursing Clerk, Treasury Department.

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due. Payment may, therefore, be made in the amounts shown in column 7.

Date July 31, 1924.

———,
Commissioner of Internal Revenue.

Item No.	Certificate of overassessment or claim number	Name and address of taxpayer	Not amount refundable	Amount credited	(Not to be used by collector) Interest accrued	(Not to be used by collector) Total refundable	Date of final payments of accounts from which credits were transferred and overpayments found	(Not to be used by collector) Refunding taxes illegally collected 1924 and prior years	19	19	Paid by disbursing clerk, Treasury Department, by checks, dated 19 , numbered as follows:	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
X	X X X	Totals of ——— items in this schedule					X X					
	X X X	X X X	X X	X X	X X	X X	X X	X X			X X	X X
11	651133	Buick Boston Co		23,181.08			8-18-21					
	X X X	X X X	X X	X X	X X	X X	X X	X X				
		X X X										
		Page totals only					X X				X X	X X

9. The petitioner seasonably made application for interest upon the credits allowed as above set forth. On February 1, 1926, the commissioner allowed interest thereon in the amount of $219.02 computed at one-half of one per cent per month on $1,421.19, the amount of the additional tax from August 18, 1921, to March 14, 1924, covering a period from the date of payment of said additional tax to the date upon which the commissioner claimed the credit was allowed as provided by section 1324 of the revenue act of 1921. The petitioner thereupon protested to the commissioner against the allowance of interest under the revenue act of 1921 and claimed that it was entitled to interest upon said credits as provided by section 1019 of the revenue act of 1924, which claim the commissioner has denied.

10. All claims by the petitioner were duly filed and all conditions precedent to the bringing of this action have been complied with.

CHARLES W. MULCAHY,
Attorney for Petitioner.
FREDERICK H. TARR,
United States Attorney.
By J. M. LEINENKUGEL,
Special Asst. to the U. S. Attorney.
Attorneys for Respondent.

10 In United States District Court

Minute entry of hearing

On the said 14th day of March said cause came on to be heard on the aforementioned agreed statement of facts.

Said cause was thence taken under advisement from term to term to the June term, A. D. 1928, when, to wit, July 5, 1928, an opinion of the court was announced, finding that plaintiff was entitled to interest.

At the same term, to wit, July 25, 1928, a draft bill of exceptions was filed by the defendant.

This cause was then continued to the present September term, A. D. 1928, when, to wit, November 5, 1928, a substituted bill of exceptions is filed and allowed.

In United States District Court

Agreement for judgment

Filed November 28, 1928

It is hereby agreed that judgment may be entered for the plaintiff in the sum of $6,675.83 with costs.

CHARLES W. MULCAHY,
Attorney for Plaintiff.
FREDERICK H. TARR,
United States Attorney,
By J. DUKE SMITH,
Special Asst. to the U. S. Attorney,
Attorneys for Defendant.

In United States District Court

Judgment

Thereupon, to wit, November 28, 1928, it is considered by the court, the Honorable Elisha H. Brewster, district judge, sitting, that the said Boston Buick Company, plaintiff, recover of the said United States, defendant, the sum of six thousand six hundred seventy-five dollars and eighty-three cents ($6,675.83) damages, and its costs of suit taxed at . . .

In United States District Court

Defendant's substitute bill of exceptions

Filed and allowed November 5, 1928

11 This is a petition against the United States to recover interest on an overassessment of income and profits taxes for the fiscal year 1918, and applied as a credit against outstanding taxes for other years. The pleadings are part of this record and may be referred to as part of this bill of exceptions. The case was tried before Brewster, J., without a jury upon an agreed statement of facts. The following are all the material facts in the case.

The petitioner is a corporation organized and existing under the laws of the Commonwealth of Massachusetts, having its usual office and place of business at Boston, in said Commonwealth and within this district. The petitioner was formerly named Buick Boston Company, but by amendment to its charter in 1919 its name was changed to Boston Buick Company.

The amount claimed in this petition does not exceed ten thousand dollars.

The accounting period of the petitioner is and was during the years hereinafter referred to a fiscal year ending July 31. On or

about January 6, 1919, in accordance with extensions of time for filing returns granted by the Commissioner of Internal Revenue, the petitioner duly made to the collector of internal revenue at said Boston a tentative return of its income for the fiscal year ended July 31, 1918, under the provisions of the revenue act of 1917, and within the time allowed by said extensions, to wit, on or about June 14, 1919, made a final return of its income for said period to said collector under the provisions of the revenue act of 1917 and the revenue act of 1918.

Upon its said returns the petitioner was originally assessed income and profits taxes amounting to $109,005.85, and an additional assessment was later made, to wit, on or about August 18, 1921, in the sum of $1,421.19, making a total assessment for said period of $110,427.04. The amount of said assessment was paid by the petitioner to the said collector of internal revenue on the following dates:

12	January 6, 1919	$80,000.00
	January 8, 1919	17,584.56
	March 17, 1919	6,263.41
	September 12, 1919	2,302.56
	December 9, 1919	2,855.32
	August 19, 1921	1,421.19
	Total	110,427.04

On or about December 17, 1923, the petitioner made application to the Commissioner of Internal Revenue for special assessment of its excess profits tax for said period under the provisions of section 210 of the revenue act of 1917 and section 328 of the revenue act of 1918. On February 19, 1924, the petitioner filed a claim for refund of the taxes paid for said period in the sum of $82,233.56 upon the ground that it was entitled to special assessment under the sections above referred to. On or about February 26, 1924, the petitioner was notified by the Commissioner of Internal Revenue that its application for special assessment had been allowed and that the correct tax liability of the petitioner for said period was $87,245.96, resulting in an overassessment of $23,181.08, and that the amount of said overassessment would be made the subject of a certificate of overassessment to be forwarded through the office of the collector of internal revenue at Boston and to be applied by him in accordance with section 252 of the revenue act of 1921.

The overassessment referred to in the foregoing paragraph was listed by the Commissioner of Internal Revenue upon a schedule of overassessments, under date of March 14, 1924, and forwarded by him to the collector of internal revenue at Boston, a copy of which schedule, including the certificate of deputy commissioner, authorization of commissioner, and certificate of collector appearing thereon is annexed hereto and made a part hereof, being marked "A."

13 The collector, under date of July 11, 1924, acted upon said schedule, made the entries shown on said schedule in the columns headed "Entries to be made by the collector," certified thereto as set forth in "certificate of collector," and returned the same to the

commissioner, together with a schedule of refunds and credits, a copy of which, including the certificate of collector, certificate of deputy commissioner, and authorization of commissioner appearing thereon is annexed hereto and made a part hereof, being marked "B."

The petitioner on April 15, 1924, duly filed with the Commissioner of Internal Revenue a claim for overpayment for the fiscal year 1918 of $23,101.08, asking for a credit in the sum of $15,903.99 against an installment of income tax due from the petitioner on that date for its fiscal year ended 1923 and a refund of the sum of $7,277.09, and thereafter on July 3, 1924, filed a further claim asking that the amount of $7,277.09 theretofore claimed as a refund be applied as a credit against an installment of income tax due from the petitioner on July 15, 1924, for its fiscal year ended 1923.

Said overassessment was applied by the collector as follows: On July 11, 1924, there was entered upon the books of the collector against outstanding taxes due from the petitioner on October 15, 1919, for the fiscal year ended 1919, a credit of $7,277.09, and in addition thereto a credit of $15,903.99 against an installment of income tax due from the petitioner on April 15, 1924, for the fiscal year ended 1923. Thereafter, on November 11, 1924, said credit of $7,277.09 was applied by the collector against an installment of income tax due from the petitioner on July 15, 1924, for the fiscal year ended 1923, and taken away from the petitioner's account for fiscal year 1919.

The petitioner seasonably made application for interest upon the credits allowed as above set forth. On February 1, 1926, the commissioner allowed interest thereon in the amount of $219.02
14 computed at one-half of one per cent per month on $1,421.19, the amount of the additional tax from August 18, 1921, to March 14, 1924, covering a period from the date of payment of said additional tax to the date upon which the commissioner claimed the credit was allowed as provided by section 1324 of the revenue act of 1921. The petitioner thereupon protested to the commissioner against the allowance of interest under the revenue act of 1921 and claimed that it was entitled to interest upon said credits as provided by section 1019 of the revenue act of 1924, which claim the commissioner has denied.

All claims by the petitioner were duly filed and all conditions precedent to the bringing of this action have been complied with.

The court in an opinion handed down on July 5, 1928, held that the credit in question was not allowed on March 14, 1924, when the schedule of overassessment was forwarded to the collector at Boston, and that said collector did not act until after June 2, 1924; that the petitioner was entitled to recover interest computed in accordance with the provisions of section 1019 of the revenue act of 1924.

The defendant being aggrieved by the ruling of the court as hereinbefore set forth, now excepts to said ruling and brings this bill of exceptions and prays that it may be allowed.

By its attorneys.

FREDERICK H. TARR.
United States Attorney.
By J. DUKE SMITH.
Special Assistant to the U. S. Attorney.

The foregoing bill of exceptions may be allowed.

CHARLES W. MULCAHY.
Attorney for petitioner.

The foregoing bill of exceptions is allowed this 5 day of Nov., 1928.

ELISHA H. BREWSTER, *D. J.*

15 [Memorandum.—Copies of schedule of overassessments and schedule of refunds and credits, marked, respectively, "A" and "B," and referred to in the foregoing bill of exceptions as annexed are here omitted, as they already appear as part of the agreed statements of facts on pages 6–9 of this transcript of record. James S. Allen, Clerk.]

In United States District Court

Opinion

July 5, 1928

[Published 27 Fed. 2d, 395]

BREWSTER, J.

This petition is brought to recover interest on an overassessment of income and profit taxes paid for the fiscal year 1918 and applied as a credit against outstanding taxes for other years.

The Government has paid interest, computed according to section 1324 (a) of the revenue act of 1921. The petitioner claims to be entitled to interest computed in accordance with the revenue act of 1924, section 1019.

It has recently been held that interest on refunds must be computed according to the rule in force at the time of the allowance of the refund. United States v. Magnolia Petroleum Co. — U. S. — 72 L. Ed. 264. Blair, Commissioner v. U. S. ex. rel. Birkenstock et al., 271 U. S. 348. That the same would hold true in the case of a claim for credit is obvious. I infer that the Government up to this point draws no distinction between a refund and a credit, and if, as the defendant contends, the petitioner's credit was allowed within the meaning of the statute prior to June 2, 1924, the effective date of the 1924 revenue act, the interest was correctly computed.

On the other hand, if the "allowance" of the credit was subsequent to that date, the act of 1924 establishes the rule then in force and the petitioner would be entitled to recover interest on the credit, as provided in section 1019 of that act. The question, therefore, is when was the credit allowed?

The case was submitted on an agreed statement of facts.
16 It appears that on March 14, 1924, the Commissioner of Internal Revenue determined that there had been an overassessment of $23,181.08, and forwarded to the collector of internal revenue at Boston a schedule of overassessments containing this item. This schedule carried instructions to the collector to immediately check the items against the accounts of the several taxpayers and "If any part of such item is found to be an overpayment" to "examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, making the appropriate entries in" his accounts, the credits and any refundable balance to be entered by the collector in a subsidiary schedule, necessary copies of which were to be returned to the Commissioner of Internal Revenue.

These instructions were followed, and on July 11, 1924, the collector certified that he had checked the items in the schedule, and had determined the amount of overpayments, and had applied indicated amounts as credits on the taxpayer's accounts, and had determined net amounts refundable. On the same date the collector certified to the subsidiary schedule, which, so far as it listed items of refundable portions of overassessments, was approved on July 31, 1924, by the Deputy Commissioner of Internal Revenue.

If we were here dealing with a refund, there could be no question raised as to the date of the allowance. It would be July 31, 1924, the date when the refund was approved for payment by the disbursing officer. Girard Trust Co. et al. v. United States, 270 U. S. 163. But in the case at bar there was no refund, and the Government contends that, notwithstanding Girard Trust Co. v. United States, the date of the allowance of a credit is the date under which the commissioner transmits to the collector a schedule of overassessments.

In the Girard Trust Company case, the overassessment was applied
in part as an abatement, in part as a credit, and the balance as
17 a refund. The court considers only the taxpayer's right to interest on the refund. The amount of the credit was relatively, inconsequential. Apparently the trust company made no claim to interest on the credit. It was there held that neither the date of payment of the amount refunded nor the date when the Commissioner of Internal Revenue first decided that there had been an overassessment and sent his decision to the collector of internal revenue was the date of allowance intended by the statute. The real date of allowance was the time when the exact amount of the refund was finally fixed by competent authorities. Until that time

no one had authority to pay. There are possible grounds for distinguishing between a refund and a credit. It will be noted that the collector, without further action on the part of the commissioner, was authorized to enter upon the petitioner's account a credit against outstanding taxes due from it. His authority to record this credit was contained in the schedule of overassessments. However, I think, in view of Girard Trust Company v. United States, supra, it can be taken as settled that the transmission of the schedule of overassessments does not constitute an allowance of either a credit or a refund. A ministerial act of another administrative officer is necessary before it can be determined that there will be any credit or before the exact amount of it can be ascertained. In the case at bar the first administrative act of the collector, with reference to the petitioner's credit, was to ascertain that there had been an overpayment of the tax for the fiscal year 1918 and to apply that overpayment to reduce outstanding taxes due for other years. Until then, to borrow from the language of the Chief Justice in the Girard Trust Company case, the exact amount of the credit was "not fixed finally by competent authority."

Inasmuch as the sole controversy is whether the revenue act of 1921 or that of 1924 applies, it is not necessary to decide whether interest should run to July 11, the date of the credit, or to
18 July 31, the date of the approval by the deputy commissioner. In either case the date is subsequent to June 2, 1924. For the purposes of this case if is sufficient to decide that the credit was not allowed on March 14, 1924, when the schedule of overassessments was forwarded to the collector at Boston. The agreed statement of facts shows plainly that he did not act until after June 2. Either date, July 11 or July 31, could be adopted without encountering the administrative complications pointed out by the court in the Girard Trust Company case in rejecting the date of payment as the date of allowance.

I confess that I am somewhat moved to my conclusion by the feeling that the results are in harmony with the purposes and intent of Congress to fairly recompense taxpayers who have been deprived of the use of their money by illegal exactions of the Government, as that intent and purpose is reflected in the later act of 1924.

I find nothing of compelling force in the arguments advanced by the Government in support of its contention that the credit was allowed when the commissioner first reported to the collector an overassessment.

I find and rule, therefore, that the plaintiff is entitled to recover interest computed in accordance with the provisions of section 1019 of the revenue act of 1924.

IN UNITED STATES DISTRICT COURT

Defendant's petition for appeal and order allowing same

Filed February 13, 1929

United States of America, defendant, appellant herein, feeling aggrieved by the order and judgment made and entered in this court on the twenty-eighth day of November, 1928, in favor of the plaintiff and against the defendant, hereby appeals from said order and judgment to the United States Circuit Court of Appeals for the First Circuit for the reasons set forth in the assignment of errors filed herewith.

19 Wherefore your petitioner prays that the appeal be allowed and citation issued as provided by law, and that a transcript of the record, proceedings, and all other papers on which said judgment and order were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the First Circuit under the rules of said court and in accordance with the law in such case made and provided.

FREDERICK H. TARR,
United States Attorney.
J. DUKE SMITH,
Special Assistant to the U. S. Attorney.

Petition for appeal allowed.

ELISHA H. BREWSTER,
U. S. District Judge.

In United States District Court

Defendant's Assignment of Errors

Filed February 13, 1929

The defendant in this action in connection with its petition for appeal makes the following assignment of errors, which it avers occurred in the trial of the case, to wit:

1. The court erred in ruling that the petitioner was entitled to recover interest computed in accordance with the provisions of section 1019 of the revenue act of 1924.

2. The court erred in failing to rule that the petitioner was entitled to recover interest computed in accordance with the provisions of section 1324 of the revenue act of 1921.

3. The court erred in failing to rule that the credit in question was allowed when the Commissioner of Internal Revenue signed the schedule of overassessments on March 14, 1924.

4. The court erred in ruling that the petitioner was entitled to recover.

20 Wherefore the defendant prays that the judgment of the District Court be reversed.

By its attorneys,

FREDERICK H. TARR,
United States Attorney.
By J. DUKE SMITH,
Special Assistant to the U. S. Attorney.

[Citation in usual form showing service on Charles W. Mulcahy omitted in printing.]

21–22 [Clerk's certificate to foregoing transcript omitted in printing.]

In United States District Court

Memorandum re order enlarging time

[Memorandum.—An order of enlargement of time for docketing case to and including March 29, 1929, is here omitted. A. I. Charron, clerk.]

23–24 [Minute entry of argument and submission, Oct. 3 and 4, 1929, omitted in printing.]

In United States Circuit Court of Appeals, First Circuit

Judgment

November 5, 1929

This cause came on to be heard October 3 and 4, 1929, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, November 5, 1929, here ordered, adjudged, and decreed as follows: The judgment of the District Court is affirmed.

By the court.

ARTHUR I. CHARRON, *Clerk.*

25 In United States Circuit Court of Appeals, First Circuit

October term, 1929

No. 2344

UNITED STATES OF AMERICA, RESPONDENT, APPELLANT

v.

BOSTON BUICK COMPANY, PETITIONER, APPELLEE

No. 2377

SAME v. IRON CAP COPPER COMPANY

Appeal from District Court of the United States for the District of Massachusetts

Before ANDERSON, WILSON AND HALE, *JJ.*

(35 Fed. 2d 560)

Opinion

Filed November 5, 1929

WILSON, *J.*

These two cases are before this court on appeal by the United States from decisions of the District Court of Massachusetts. As the same question is involved in both cases and they were argued together, one opinion will suffice to dispose of them.

The material facts in the Iron Cap Copper Company creating the issue here raised are as follows:

An examination and audit of the tax returns of the appellee for the year 1918 disclosed that the appellee had been overassessed in that year to the amount of $180322.66. On March 29, 1924, the commissioner approved a schedule of overassessments con-
26 taining a list of taxpayers who had been overassessed for the year 1918, in which was included the overassessment of the appellee in the above amount.

The schedule was made out on a form then in use in the department and known as Form 7805, which was forwarded to the collector of internal revenue at Boston with the following general instructions which were printed thereon:

"You will immediately check such items against the accounts of the several taxpayers and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated in whole or in part, and make such abatements as may be warranted by the condition of the taxpayers' accounts for the years involved.

"If any part of any such item is found to be an overpayment, you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against taxes due, if any;" and with further instructions to enter such credits and any balance in appropriate columns of the schedule of overassessments and in a subsidiary schedule then in use and designated as Form 7805A and return both form to the commissioner's office.

After the collector had conformed to these instructions, it was found that the status of the taxpayer's account required an abatement to the amount of $48,539.94, and that there had been an overpayment by the appellee of $131,782.72. He therefore credited against taxes previously assessed against the taxpayer and unpaid the sum of $102,931.89, which left a balance to be refunded to the taxpayer of $28,850.83. In accordance with above directions of the commissioner, he so reported to the commissioner on July 14, 1924, on Form 7805A, and on August 7, 1924, the deputy commissioner reported to the commissioner that the amount reported by the collector as refundable had been found correct, and together with the accrued interest set forth in the subsidiary schedule on Form 7805A was due the taxpayer. Whereupon the commissioner authorized the disbursing clerk in the Treasury Department to pay the refundable amount to the plaintiff.

27 In the Boston Buick Company case the material facts are as follows:

On the fourteenth day of March, 1924, the commissioner on Form 7805 certified to the collector at Boston that the plaintiff had been overassessed for the year 1918 to the amount of $23,881.08. The collector, following the general directions contained in Form 7805, reported back July 11th, 1924, that there had been an overpayment by this taxpayer equalling the total amount of the overassessment, which he credited on other taxes due from the taxpayer. On July 31 the deputy commissioner and the commissioner signed the usual blanks contained in Form 7805A, directing the payment of any sum disclosed by the reports of the collector as refundable.

Interest in the Iron Cap Copper Company case was allowed and paid on the amount refunded in accordance with the decision of the Supreme Court in the case of Girard Trust Company v. United States, 270 U. S. 163, but no interest was allowed on the sums credited on other taxes due from the taxpayer, either in the Iron Cap Copper Company or the Boston Buick Company. These actions are respectively brought to recover interest on the credits which the plaintiffs say should be computed under section 1019 of the revenue act of 1924, the relevant part of which reads as follows:

SEC. 1019. "Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected * * * interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum," etc.

The issue in both cases is whether the credits were allowed when the commissioner on March 14 and on March 29, 1924, certified to the collector on Form 7805 that there had been an overassessment and directed him to determine what, if any, part of the taxpayer's assessment should be abated, and if there was an overpayment, what, if any, part should be credited to other payments due from the taxpayer, or whether the credits were allowed when the collector made his report of the status of the taxpayer's account and the
28 abatements and credits allowed by him, and the commissioner, expressly or impliedly, approved his report.

The date of the allowance of the credits is the crux of both cases, since if the allowance of the credits within the meaning of the revenue acts was made when the commissioner certified to the collector the amount of the overassessments on March 14 and March 29, 1924, interest on credits must be computed under section 1324 of the revenue act of 1921, under which it is agreed by the taxpayer that no further interest should be allowed; but if the credits were not allowed until the collector had examined his accounts and determined the amount of the overpayment, if any, and the amounts then due from the taxpayer for other periods, which it is agreed was on July 11, 1924, in the Boston Buick case and on July 14th in the Iron Cap Copper Company case, or until he had made his report to the commissioner and it had expressly or impliedly received his approval on July 31, 1924, in the Boston Buick Company case and on August 7th in the Copper Company case, then it is admitted by the Government that under the decisions of the Supreme Court, Blair v. United States ex rel. Birkenstock et al., 271 U. S. 348; United States v. Magnolia Petroleum Co., 276 U. S. 160, interest should be computed under section 1019 of the revenue act of 1924, which became effective June 2, 1924, and that under section 1019 there would be due the plaintiff, Iron Cap Copper Company, as interest the sum of $11,592.18 and to the Boston Buick Company the sum of $6,675.83.

The court below found for the plaintiff in each case and in the above amounts. This court is of the opinion that the contention of the plaintiffs must be sustained and the appeals dismissed.

Prior to the revenue act of 1926 there is nothing on which to base the contention of the Government that the allowance of an overassessment is an allowance of credits, except a regulation of the Treasury Department and its persistent practice in so holding.

The commissioner, who is the final arbiter in such matters, when he determines that there has been an overassessment has no knowledge of what the status of any taxpayer's account is, whether it will disclose that there has been an overpayment
29 and, if so, whether there will be any sums due from the taxpayer for other periods to which the overpayments should be credited, or whether the overpayment must all be refunded. While Form 7805, containing the schedule of overassessments, contains a

direction to the collector if any overpayment is found to apply first to other taxes which may be then due from the taxpayer for other periods and enter any balance in appropriate columns in Form 7805 and 7805A as refundable, yet the action of the collector is not final.

The Supreme Court in Girard Trust Co. v. United States, speaking through its Chief Justice, said:

"The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and a refund or credit should be granted, and when he has made that decision finally, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section."

Again:

"The finding and the exhibits show that the course of business is that the collector on receiving from the commissioner the schedule as to the overassessment, examines his books and reports back to the bureau the amount which should be credited on taxes due and the amount to be refunded, that this is examined by the assistant commissioner and then is delivered to the commissioner, who makes it effective by his approval."

While it is true that the issue involved in the Girard Trust Company case related only to the date of the allowance of a refund, the court, though by way of dictum, as it may be argued, also as definitely fixed the time of the allowance of credits. Its dictum as to the time of allowance of credits was, we think, an inevitable conclusion from its finding as to the time of allowance of a refund, since the amount to be refunded is absolutely determined when the credits are allowed. It is no answer to say that the directions in Form 7805 are authority to the collector to apply any overpayment on any unpaid taxes for other periods and is therefore an allowance of such credits as the collector may see fit to make. It would be a strained construction of the commissioner's directions to the collector to hold that he thereby allowed and approved something of which he had no knowledge and could have none until a report was received back from the collector.

The Government, however, urges that the regulations of the Treasury Department and its practice has established a different rule as to credits, which should have great weight in construing these statutes; but it also, prior to the decision in the Girard Trust Company case, had the same regulation as to the date of allowance of refunds; yet the court in that case held that a regulation of the Treasury Department and its practice in this respect was not in accord with the statute, and that it did not control the plain effect of the acts of the commissioner and the collector. No good reason is now shown why the department regulation as to the allowance of

credits should control what appears to be the only reasonable inference to be drawn from the facts.

It is also urged by the Government that since Congress, presumably in view of the court's decision in the Girard Trust Co. case, has by its fiat in the revenue act of 1926 fixed the date of the allowance of refunds as the date of the issuing of the schedule of overassessments by the commissioner, and made no provision for fixing the date of the allowance of credits: that it is in effect a recognition by Congress of the regulation and practice of the Department as to the correct construction of the prior acts and of the commissioner's instructions to the collector as to the date of the allowance of credits.

How the Supreme Court may construe the effect of the revenue act of 1926 as to the time of allowance of future credits we can not anticipate; but so long as its decision stands as to the time of allowing a refund prior to the enactment of the 1926 act we thing that the time of allowance of credits, if any, at least prior to that act, must be the same as that of the allowance of a refund or when the commissioner or his deputy approved the collector's report of his doings on Form 7805A.

The decision in Penn Smokeless Coal Co. v. United States,
31 decided in the Western District of Pennsylvania, January 3, 1929, is of little weight to the contrary, inasmuch as the sitting judge in that case inadvertently misconstrued the opinion of the Chief Justice in the Girard Trust Co. case.

The Court of Claims, however, in the case of Swift & Co. v. United States, decided May 6, 1929, followed the opinion of the Supreme Court as applied to the allowance of credits.

Even if large sums have been credited to taxpayers without the signature of the commissioner on the collector's report after it is returned to his office, it can not change the law, though it does not follow from facts stated by counsel in argument that the commissioner's assent to the report of the collector may not in each case have been implied.

In United States Circuit Court of Appeals

The judgments of the district court are affirmed.

Order staying mandate

Thereafter, to wit, on January 2, 1930, upon motion by appellant, assented to, mandate was stayed until further order of court.

[Clerk's certificate to foregoing transcript omitted in printing.]

32 Supreme Court of the United States

Order allowing certiorari

Filed March 17, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1930